UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SIOUX CITY COUNTRY CLUB, Plaintiff, vs. CINCINNATI INSURANCE COMPANY, Defendant.	No. C03-4071-PAZ **MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

On February 2, 2004, the defendant Cincinnati Insurance Company ("Cincinnati") filed a motion for summary judgment, a statement of material facts, a supporting brief, and an appendix. (Doc. No. 11) On March 31, 2004, the plaintiff Sioux City Country Club (the "Country Club") filed a resistance to the motion, a response to the defendant's statement of material facts, a statement of additional material facts, a brief in support of the resistance, and an affidavit. (Doc. No. 14). On April 9, 2004, Cincinnati filed a reply brief. (Doc No. 15)

Cincinnati requested oral arguments on the motion. The request for oral argument was granted, and the court heard arguments on June 21, 2004. John F. Lorentzen appeared for the defendant, and Matthew T. Early appeared for the plaintiff.

The court has considered the parties' submissions and arguments carefully, and turns now to discussion of the issues raised by Cincinnati in its motion.

I. INTRODUCTION

Cincinnati issued a property insurance policy to Country Club effective from August 1, 1999, to August 1, 2002 ("the policy"). On May 29, 2002, rain fell on the premises of the Country Club. Water from the rain collected on the Country Club parking lot and drained through a storm sewer leading to an underground drainage pipe. A hole had rusted through the pipe, and water leaked out from the hole and saturated the ground. The weight of the saturated soil caused the collapse of a retaining wall, in turn causing damage to other property belonging to the Country Club. The Country Club submitted a claim on the policy for the damages, but Cincinnati denied the claim.

In July 2003, the Country Club filed a petition in Iowa state court asking for a judgment declaring that the policy covered the Country Club's damages. Cincinnati removed the case to this court on August 1, 2003. (Doc. No. 1) On August 7, 2003, Cincinnati filed an Answer denying there was coverage under the policy. (Doc. No. 4) On October 14, 2003, the parties consented to jurisdiction by a United States magistrate judge, and on October 27, 2003, the district court filed an order transferring case to the undersigned. (Doc. No 7&8)

II. UNDISPUTED FACTS

There is no serious dispute about the facts in this case. On May 29, 2002, it rained in Sioux City, Iowa. Water from the rain collected on a paved parking lot next to the Country Club clubhouse. Some of the water drained into a storm sewer inlet, then into the storm sewer, and then into an underground drainage pipe that carried the water down a twenty-foot slope to a concrete, vertical drop manhole located behind a retaining wall. The slope between the parking lot and some tennis courts was held in place by a retaining wall. The rainwater leaked out through a hole that had rusted through the underground

drainage pipe and saturated the ground. The weight of the saturated soil behind the retaining wall caused the wall to fail and collapse onto the tennis courts. The Country Club has made claim for damages to the underground drainage system, the graded slope, the retaining wall, fencing, decking, electrical cabling, and the tennis courts, and for cleanup expenses.

Under Section A of the policy (App. 15), Cincinnati agreed to pay for direct physical loss to "covered property" at the "premises" described in the declarations. "Covered property" is defined in Section A to include only certain specified types of property "for which a limit of insurance is shown on the Declarations." (*Id.*) The declarations page (App. 75) does not include a list of property with accompanying limits of insurance, but it incorporates a "statement of values" (App 90) which lists the clubhouse and other property. The "statement of values" corresponds with the coverage limits provided in the declarations. (App. 75) The term "premises" is defined in the policy as "the Location of Premises described in the Declarations." (App. 40) Similarly, no "location" is identified or listed in the declarations (App. 75), but a separate declarations page (App. 72) incorporates a "schedule of locations" (App. 74), which includes "40th and Jackson," the address of the Country Club.

Under Section A of the policy, buildings and outdoor fences "for which a limit of insurance is shown on the Declarations" are "Covered Property" under the policy. (App. 15) On the "statement of values" and in the declarations (App. 90, 75), the clubhouse, other structures, and related personal property are listed at an agreed value of $2,476,997. The clubhouse also is separately listed as having an agreed value of

$1,659,677.[1] Under Section A of the policy, the term "building" is defined to include, *inter alia*, fixtures, including outdoor fixtures. (App. 15 § A.1.a.(2))

Outdoor fences are not included on the statement of values (App 90), and therefore do not have a "limit of insurance" in the declarations. However, according to subsection A.5.e. of the policy(App. 29-30), the insured "may extend" the insurance provided for buildings "to apply to outdoor fences located within 1,000 feet of the 'premises' for which a Limit of Insurance is not shown in the Declarations," but only in the amount of $5,000 for any one occurrence.[2]

Under the policy, the term "covered property" does not include the following: the cost of excavations, grading, backfilling, or filling (App. 16 § A.2.e.); land (including land on which the property is located), water, growing crops, or lawns (App. 16 § A.2.g.); bridges, roadways, walks, patios, or other paved surfaces (App. 16 § A.2.h.); retaining walls that are not part of any building described in the declarations (App. 16 § A.2.l.); underground pipes, flues, and drains (App. 16 § A.2.m.); and outdoor fences, except for

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[1] According to Cincinnati, it used the value of the clubhouse alone, $1,659,677, to calculate the premium paid by the Country Club to insure the clubhouse, but not the value of the other property included in the Country Club's claim against Cincinnati (*i.e.*, an underground drainage system, a graded slope, a retaining wall, fences, decking, electrical service around the tennis courts, and the tennis courts themselves).

[2] The following is provided under the heading "Coverage Extensions" in subsection A.5. of the policy:

> Unless amended within the Extension, each Extension applies to property located in or on the building described in the Declarations or . . . within 1,000 feet of the "premises."
>
> The limits applicable to the Coverage Extension are in addition to the Limits of Insurance shown in the Property Declarations. Limits of Insurance specified in these Extensions apply per location unless stated otherwise.

(App. 25).

outdoor fences for which a Limit of Insurance is shown in the Declarations (App. 17 § A.2.p.(3)).

Ths policy excludes coverage for any loss caused directly or indirectly by earth movement or water, regardless of whether any other cause or event contributed to the loss. (section A.3.b.(1)(b) & (g), App. 17-18) The exclusion for earth movement applies to "any earth movement (other than sinkhole collapse), such as . . . landslide . . . or earth sinking, rising or shifting." (section A.3.b.(1)(b), App. 17) The exclusion for water applies to surface water; mud slide or mud flow; and water under the ground surface pressing on, or flowing or seeping through, foundations, walls, or paved surfaces. (section A.3.g., App. 18)

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. *See* Fed. R. Civ. P. 56(a), (b). Rule 56 further states that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa

1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [the] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Matsushita*, 475 U.S. at 586-87). Once the moving party meets its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Lockhart*, 963 F. Supp. at 814 (citing *Matsushita*, 475 U.S. at 586). "Mere allegations not supported with specific facts are insufficient to establish a material issue of fact and will not withstand a summary judgment motion. Only admissible evidence may be used to defeat such a motion, and affidavits must be based on personal knowledge." *Henthorn v. Capitol Communications*, 359 F.3d. 1021, 1026 (8th Cir. 2004) (internal citations omitted).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has explained that the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Cincinnati Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Furthermore, the Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue exists for trial, rather than "weigh the evidence and

determine the truth of the matter." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 323-24; *Matsushita*, 475 U.S. at 586-87).

The Eighth Circuit recognizes that "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (citing Fed. R. Civ. P. 56(c)). The Eighth Circuit, however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* (quoting *Celotex*, 477 U.S. at 327). *See also Hartnagel v. Norman*, 953 F.2d at 396.

Thus, the trial court must assess whether a nonmovant's response would be sufficient to carry the burden of proof at trial. *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323; *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990). However, if the court can conclude that a reasonable jury could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248; *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Woodsmith*, 904 F.2d at 1247.

Accordingly, if Cincinnati shows no genuine issue exists for trial, and if the Country Club cannot advance sufficient evidence to refute that showing, then Cincinnati is entitled to judgment as a matter of law, and the court must grant summary judgment in Cincinnati's favor. If, on the other hand, the court "can conclude that a reasonable trier of fact could return a verdict for [the Country Club], then summary judgment should not be granted." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)

Keeping these standards in mind, the court now will address the defendant's motion for summary judgment.

IV. ANALYSIS

A. What Property Is Covered by the Policy?

The Country Club asserts that "nearly all" of the damaged property included in its claim against Cincinnati was insured under the policy, including outdoor fences, the underground drainage system, the graded slope, the retaining wall, decking, electrical cabling, and the tennis courts. Country Club argues fences were "covered property" under the terms of the policy, and the remaining items of property were"outdoor fixtures" under the terms of the policy. Cincinnati denies fences were "covered property" under the terms of the policy, and also denies the other items of property were "outdoor fixtures" covered by the policy.

1. The outdoor fences

The fences are not listed as covered property in the policy declarations, and therefore they are not insured separately under the policy. The policy provides that an insured "may extend" the insurance provided to buildings to cover outdoor fences located within 1,000 feet of the "premises," even if the fences are not listed in the declarations, but only to the extent of $5,000 for any one occurrence.

Because it does not appear the Country Club extended the policy to cover the fences damaged in the May 29, 2002, incident, the fences were not covered under the policy.

2. The underground drainage system, the graded slope, the retaining wall, decking, electrical cabling, and the tennis courts

The court next must consider whether the other items of property damaged on May 29, 2002, were "outdoor fixtures." The Country Club argues they were, and Cincinnati argues they were not.

Iowa follows the general rule in contract interpretation that "when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991) (citations omitted). An insurance policy is a contract that is subject to the general rules of contract analysis. *See Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 590 (Iowa 1990).

The Iowa Supreme court has explained the court's task in considering disputes over insurance contracts, as follows:

> When construing or interpreting the meaning of insurance policy provisions we strive to ascertain the intent of the parties at the time the policy was sold. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988); *State Auto. & Casualty Underwriters ex rel. Auto. Underwriters v. Hartford Accident & Indem. Co.*, 166 N.W.2d 761, 763 (Iowa 1969).
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> "Interpretation" and "construction" are technically distinct exercises with regard to resolving insurance contract problems. *Connie's Constr. Co. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975). "Interpretation" calls for this court to determine the meaning of contractual words. *Id.* These questions are legal in nature unless the meaning of the language "depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." *Id.* Construing a contract, on the other hand, calls for this court to determine the legal effect of a contract. *Id.* The proper

> construction of an insurance contract is always an issue of law for the court to resolve. *Id.*
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> Insurance contracts are construed in the light most favorable to the insured. *Id.* Exclusion provisions in insurance policies are construed strictly against the insurer. *Bankers Life Co. v. Aetna Casualty & Sur. Co.*, 366 N.W.2d 166, 169 (Iowa 1985). When construing insurance policies "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Grinnell*, 431 N.W.2d at 786 (quoting *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973)). The principle of reasonable expectations "undergirds the congeries of rules applicable to construction of insurance contracts in Iowa." *Rodman*, 208 N.W.2d at 906.
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> When construing insurance policies we consider the effect of the policy as a whole, in light of all declarations, riders, or endorsements attached. *Bankers Life*, 366 N.W.2d at 168-69; *Stover v. State Farm Mut. Ins. Co.*, 189 N.W.2d 588, 591 (Iowa 1971); *Hartford Accident*, 166 N.W.2d at 764.

Ferguson v. Allied Mutual Ins. Co., 512 N.W.2d 296, 299 (Iowa 1994).

The court gives undefined words their ordinary meanings, as they would be understood by a reasonable person rather than by a specialist or expert. If words are susceptible to two interpretations, the court adopts the interpretation favorable to the insured. *McDonald Indus., Inc. v. Ins. Co. of North Am.*, 475 N.W.2d 607, 619 (Iowa 1991) (citations omitted).

The term "outdoor fixtures" is not a defined term in the policy, but the policy identifies several types of property that specifically are *not* covered. The term "covered property" does not include the cost of excavations, grading, backfilling, or filling; land or lawns; bridges, roadways, walks, patios, or other paved surfaces; retaining walls that are not part of any building described in the declarations; and underground pipes, flues, and

drains. If an item of damaged property is specifically identified in the policy as not being covered, then that specific identification would control over the general term "outdoor fixtures."

The underground drainage system fits squarely within the definition of "underground pipes, flues, and drains," and therefore was not covered under the policy. The graded slope is "land," and repairing the collapsed graded slope would involve excavation, grading, backfilling, or filling. Therefore, the graded slope also was not covered under the policy. From the record, the court cannot determine whether the retaining wall was part of the clubhouse, so this issue cannot be resolved on summary judgment. The electrical cabling and the decking do not appear to fall within any of the categories of property "not covered" by the policy.

There is no question that the tennis courts are "paved surfaces." The Country Club argues there is an ambiguity concerning whether the tennis courts should be considered as "paved surfaces" or "outdoor fixtures" under the policy because tennis courts are a central part of the operations of a country club. The Country Club argues the ambiguity must be resolved against the insurer. The court is not persuaded by this argument, and finds the tennis courts were "paved surfaces" for purposes of the policy, and accordingly the tennis courts were not covered by the policy.

Cincinnati also argues the retaining wall, the decking, and the electrical cabling were not "outdoor fixtures" because they were not attached to the clubhouse building. This is a factual issue that cannot be resolved on summary judgment.

Despite the factual dispute regarding whether the retaining wall, decking, and electric cabling were "outdoor fixtures," Cincinnati still may be entitled to summary judgment if the losses relating to those items were excluded from the policy.

B. What Loss Is Excluded from Coverage under the Policy?

Cincinnati argues the loss claimed by the Country Club resulted from a cause that is expressly excluded from coverage under the policy; *i.e.*, "earth movement" or "water." The exclusion for earth movement applies to any loss caused "directly or indirectly" by any earth movement, such as a landslide. The exclusion for water applies to any loss caused "directly or indirectly" by surface water, mud slide, or mud flow.

There is no question that all of the damages claimed by the Country Club were caused, directly or indirectly, either by surface water or a mudslide. Surface water caused the collapse of the graded slope and the retaining wall, and the resulting mudslide caused the remaining damages. The Country Club argues the policy exclusions were intended to apply only to naturally-occurring surface water or mudslides, and the damage in this case was caused by extraneous water that was introduced into the environment due to the leaking drainage pipe. The court has reviewed the cases cited by the Country Club in support of its argument and finds them inapplicable to the present circumstances. Nothing could be more "naturally occurring" than the accumulation of rain water. The Country Club's damages were caused by a mudslide from the saturation of the soil by rain water. The fact that the accumulation of water was due to a leaky drainage pipe does not somehow set the occurrence outside the policy exclusion for damage due to earth movement and water.

V. CONCLUSION

Based upon the foregoing analysis, Cincinnati's motion for summary judgment (Doc. No. 11) is **granted**. Judgment will issue in favor of Cincinnati and against the Country Club.

IT IS SO ORDERED.

DATED this 22nd day of June, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT